

THE LORDS as to this case, did find, that the suffering the prisoner to go abroad frequently, if it was upon necessary occasions, could not make them liable, neither the suffering him to go to church with a keeper, it being the general custom of burrows; but for his crossing the ferry, they ordained the defenders to prove, that it was because of his sickness and indisposition, which was sufficient to free them. But being resolved as to the future, by an act of sederunt, to declare the power of Magistrates as to the prisoners for debt, did ordain, that no prisoner should be suffered to go out of prison, upon any cause whatsoever, except in the case of extreme sickness, and where they are in danger of their life, and that upon a certificate from a physician, apothecary, or minister, upon soul and conscience, that they are in that condition, which, if they transgress, they shall be liable for the debt, unless there be an express warrant, or order, from the Lords of Privy Council, or Lords of Session, empowering them for that effect.

No 49.

Gosford, MS. No 347. p. 166.

1675. February 3.

VANSE, Supplicant.

THE Goodman of the tolbooth of Edinburgh having given in a petition to the LORDS, craving that he being at a great loss by reason of a custom of the Town of Edinburgh not allowing any prisoner for debt to be set at liberty except by warrant from the LORDS, and letters under the Signet, which was the occasion of great prejudice to the complainer; seeing, in the tolbooth of the Cannongate, or other prisons, upon a naked consent of the creditor, the debtor is set at liberty, without any such warrant or charge, which occasions most part of debtors under caption to go to those prisons where they have that liberty. THE LORDS did consider the bill, and that point, that debtors being incarcerated by letters directed in the King's name, as disobedient; and for punishment, if upon a private warrant of the party concerned he could be set at liberty, which was of a general concernment; as likewise, on the other part, that the only cause of the imprisonment being for a civil debt, which was satisfied to the party only concerned who consented to the liberation, if notwithstanding he should be kept prisoner, the King did want the benefit of a free subject, and the consequence was only to put the party to unnecessary charges in procuring relaxation, and charges to put at liberty; they did at last resolve upon this expedient, that in case the debt did not exceed 200 merks, a discharge, and consent of the party, intimated to the keeper of the prison, should be sufficient to liberate the prisoner; but, if the debt exceeded that sum, it must be by warrant from the LORDS.

No 50.
Found that if the debt did not exceed 200 marks, a debtor might be liberated, with consent of the creditor: if the sum was greater, warrant of the Lords was requisite.

Fol. Dic. v. 2. p. 171. Gosford, MS. No 744. p. 457.

* * * Dirleton reports this case :

No 50.

1675. February 5.—Mr VANSE, jailor of the tolbooth of Edinburgh, did give in a bill, complaining that the jailor of the Canongate was in use to enlarge prisoners put in for debt, upon the warrant and consent of the creditor at whose instance they were imprisoned; whereas the complainer did not enlarge any such prisoners, without warrant of the LORDS' letters; and therefore desired, that either he should be allowed to have the same liberty, or that it should be denied to other jailors.

THE LORDS did consider what was fit to be done in all such like cases; and in end, the plurality did resolve, that where the sums were small, not exceeding 200 merks, the jailor might enlarge prisoners for debt, without any other warrant but the consent of the parties at whose instance they were imprisoned; which they did upon that consideration, that poor people, if they should be forced to suspend and relax, with a warrant to put them out, would be sometime put to more charges than the debt doth amount to. Five of the LORDS did dissent, being of the opinion, That the prison being his Majesty's prison, no person could be put in upon letters of caption, unless the same were under the Signet; and no person put in by warrant of the said letters, could be enlarged without letters to that effect; *nam unumquodque dissolvitur eo modo quo contrahitur*; and the prisoner being put in for his rebellion, could not be enlarged, unless he were relaxed; and if parties did suffer themselves to be taken and incarcerated for small sums, it was their own fault, and more inexcusable the less the sum be; and *majus & minus non variant speciem*; and it being acknowledged by the law, they being prisoners for greater sums, they could not be enlarged without a warrant to put them to liberty; and the law making no distinction of greater and less sums, the LORDS had not a legislative power to alter or qualify the same without an act of Parliament.

Dirleton, No 238. p. 114.

1675. November 17. HALYBURTON of Innerleith.

No 51.

THE LORDS, upon a bill presented by ——— Halyburton, late of Innerleith, prisoner in Edinburgh for debt, did permit that, until January next, he should in the day time go out with a keeper, the magistrates being liable if he should escape: This was done upon pretence that he intended to settle with his creditors, which he could not do unless he were allowed the liberty foresaid: But some of the LORDS were of the opinion, that the imprisonment of a debtor being the ultimate length of execution, and not only *custodiæ causa*, but in that effect *tædio* and *fetore carceris* debtors may be driven to take a course with their creditors; that therefore the LORDS had not power to give any indulgence